



# KANSAS

Bill Graves  
*Governor*

OFFICE OF THE SECURITIES COMMISSIONER

David Brant  
*Commissioner*

February 12, 2002

Kathleen G. Duggan  
Cahill, Gordon & Reindel  
Eighty Pine Street  
New York, NY 10005-1702

RE: Interpretive Opinion No. 2002-004  
Exchange Exemption

Synopsis: The October 26, 2001 amendment to Kan. Admin. Reg. 81-5-7 was intended to repeal portions of the "exchange exemption" that were made obsolete by the federal preemption for "covered securities" in the Securities Act of 1933, Section 18(b)(1). Portions of the exemption involving non-covered securities were erroneously repealed.

Dear Ms. Duggan,

I have received your letter dated February 4, 2002, in which you suggest that a recent amendment to Kan. Admin. Reg. 81-5-7 (the "exchange exemption") has resulted in some unintended consequences. You request confirmation that your clients may continue to rely on the exchange exemption as it existed before the amendment.

In general, Kan. Admin. Reg. 81-5-7 provides that securities listed on certain stock exchanges are exempt from registration under the Kansas Securities Act. The regulation was amended effective October 26, 2001, and the pre-amendment and post-amendment versions are set forth in their entirety in Attachment 1. The primary effect of the amendment was to repeal the registration exemption for securities listed or approved for listing on the New York Stock Exchange (NYSE) or American Stock Exchange (AMEX), and for securities designated or approved for designation as NASDAQ National Market System (NMS) securities. However, the amendment also resulted in the repeal of the registration exemption for the following:

- a) any other security of an issuer of a NYSE-listed, AMEX-listed, or NMS-designated security which is of senior or substantially equal rank to the listed or designated security;
- b) a security issuable under rights or warrants listed on the NYSE or AMEX, or designated on the NMS; and

- c) a warrant or right to purchase or subscribe to: (1) any security listed on the NYSE or AMEX, or designated on the NMS; (2) a security of the same issuer that is senior or of substantially equal rank to a security listed or designated on the NYSE, AMEX, or NMS; or (3) a security issuable under rights or warrants listed or designated on the NYSE, the AMEX, or the NMS.

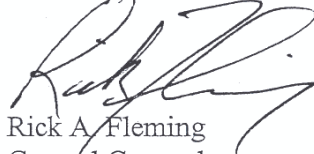
You are correct in your assumption that the amendment was intended to repeal portions of the exchange exemption that were made obsolete by the federal preemption for "covered securities" in the Securities Act of 1933, Section 18(b)(1). Section 18(b)(1) prohibits states from requiring registration for covered securities, including securities listed or designated on the NYSE, AMEX, or NMS, so it is no longer necessary for Kansas regulations to exempt those securities from registration. Likewise, the securities described above in item (a) are included in the definition of covered securities, so that portion of the regulation is rendered obsolete by federal preemption and its repeal is appropriate.

Unfortunately, the amendment to Kan. Admin. Reg. 81-5-7 also eliminated the exchange exemption for securities listed in items (b) and (c) above. These particular types of securities are not considered covered securities under Section 18(b)(1), so the federal law does not preempt state regulation of the securities. Therefore, the elimination of the Kansas exemption has created a situation in which these securities must now be registered under the Kansas Securities Act unless some other exemption applies. This was not our intention.

Because the amendment to Kan. Admin. Reg. 81-5-7 resulted in the unintended consequences described above, the Commissioner plans to adopt another amendment to correct the error. Until such time, the Commissioner will take no enforcement action against a person who offers or sells the securities described in items (b) or (c) without registering the securities under the Kansas Securities Act.

Please note that any variance from the facts expressed in your letter could result in a different conclusion. This opinion is intended solely as an expression of enforcement policy, and its legal conclusions are not binding on any court, legal tribunal, or any other person.

Sincerely,



Rick A. Fleming  
General Counsel

## ATTACHMENT 1

### **81-5-7 before October 26, 2001.**

Exchange and NASDAQ/NMS exemption.

The following securities shall be exempt under K.S.A. 17-1261(g):

(1) a security listed or approved for listing upon notice of issuance on:

- (A) the New York stock exchange;
- (B) the American stock exchange;
- (C) the Chicago stock exchange;
- (D) the Chicago board options exchange;
- (E) tier I of the Philadelphia stock exchange;
- (F) tier I of the Pacific stock exchange; or
- (G) tier II of the Pacific stock exchange;

(2) a security designated or approved for designation upon notice of issuance as a NASDAQ national market system security;

(3) any other security of the issuer of the listed or designated security which is of senior or substantially equal rank to the listed or designated security;

(4) a security issuable under rights or warrants so listed or designated; and

(5) a warrant or right to purchase or subscribe to any of the foregoing.

(b) Securities described as small-cap or emerging companies by an exchange or market system named under subsection (a) shall not be exempt under K.S.A. 17-1261(g).

(c) When deemed necessary to protect the public interest, the exemption for a specific security or category of securities may be disallowed by order of the commissioner.

### **81-5-7 effective October 26, 2001.**

Exchange exemption.

(a) The following securities shall be exempt under K.S.A. 17-1261(g), and amendments thereto:

(1) a security listed or approved for listing upon notice of issuance on any of the following:

- (A) the Chicago stock exchange;
- (B) the Chicago board options exchange;
- (C) tier I of the Philadelphia stock exchange;
- (D) tier I of the Pacific stock exchange; or
- (E) tier II of the Pacific stock exchange;

(2) any other security of the issuer of the listed security which is of senior or substantially equal rank to the listed security;

(3) a security issuable under rights or warrants so listed; and

(4) a warrant or right to purchase or subscribe to any security listed above in paragraphs (a)(1) through (3).

(b) Securities described as small-cap or emerging companies by an exchange named under subsection (a) shall not be exempt under K.S.A. 17-1261(g), and amendments thereto.

(c) When deemed necessary to protect the public interest, the exemption for a specific security or category of securities may be disallowed by order of the commissioner.